Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Infrastructure Development by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

Steven F. Morris
Jennifer K. McKee
Danielle J. Piñeres
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW – Suite 100
Washington, D.C. 20001-1431

July 17, 2017

EXECUTIVE SUMMARY

NCTA supports the Commission's goal of streamlining the process for, and reducing the associated costs of, deploying broadband facilities on poles and public rights-of-way. The record demonstrates that excessive costs and delays present significant obstacles to deployment. In these reply comments, NCTA identifies a number of steps the Commission should take quickly to promote deployment, as well as issues where it should await recommendations from the Broadband Deployment Advisory Council before deciding on next steps.

Improve the Pole Attachment Process. The record supports a variety of actions the Commission can take to improve the pole attachment process. Specifically, as recommended in NCTA's initial comments, the Commission should accelerate broadband deployment by: (1) proscribing unnecessary engineering studies and make-ready analyses; (2) expediting short, last-mile, line extensions that promote competition in business data services; (3) reaffirming a cable operator's right to share utility easements; and (4) requiring pole owners to publish their schedules of make-ready charges. The Commission also should improve its complaint process by ensuring that attaching parties are able to access the pole attachment cost information necessary for informal resolutions and adopting a 180-day (or shorter) shot-clock so that formal complaints will be promptly resolved.

The Commission should reject utilities' familiar demands for higher pole rents and new fees and burdens. It should enforce its *existing* rules for gaining access to poles, which utilities have unfortunately ignored, and it should encourage the use of electronic notification systems to coordinate work. These reforms will provide all attaching entities with the certainty and cost constraints that are critical to deployment. Finally, the Commission should establish a presumption that pole attachment rates charged by municipal electric utilities, in order to be "fair and reasonable" and "competitively neutral and nondiscriminatory" under Section 253, and not

"unduly discriminatory" under Section 622, must not exceed the rates that would be produced by the Commission's cost-based pole rate formula.

Defer Consideration of One Touch Make-Ready. The pole attachment process could also benefit from rule changes to coordinate work required for new entrants, but such rules must be grounded in the principle that existing attachers must be provided with adequate prior notice of *all* planned work and the opportunity to control any work performed on their facilities. The record demonstrates that one touch make-ready does not follow these principles and is far more problematic than its advocates have shared with the Commission. In practice, one touch has resulted in repeated misclassification of complex work as "routine," no notice to existing attachers, high rates of safety violations, and significant damage to existing networks resulting in service outages. Rather than confronting this practical reality, much of the record consists of finger-pointing that fails to produce any viable plan or to strike the necessary balance between the goals of promoting broadband deployment and safeguarding the reliability of existing networks. Ultimately, for such a profound reform to be successful, it should be developed first through the multi-stakeholder BDAC and subsequently considered by the Commission in a further notice.

Constrain Fees and Burdens Imposed by State and Local Governments. State and local regulations can often make a substantial difference in whether, and how quickly, a provider is able to deploy broadband or telecommunications facilities. There is broad support in the record for the Commission to play a more assertive role in preempting state and local requirements that go too far in hindering new deployment. In particular, the Commission should make clear that fees for accessing the public rights-of-way may not exceed the costs attributable to such use by providers. Moreover, to the extent a cable operator pays cable franchise fees that cover such costs, it should not also be subject to separate broadband or telecommunications fees.

The Commission also should place constraints on the ability of municipalities to impose unwarranted restrictions on the use of certain types of construction, e.g., deployment of aerial facilities, or requirements to obtain prior approval before providing particular services or using particular types of equipment.

Promote Deployment by All Types of Providers and Technologies. Although the Commission has created separate dockets to consider wireline and wireless deployment, the two topics are highly related as wireline and wireless services continue to converge and compete with each other. The Commission should strive to streamline deployment obstacles for all types of providers without putting a thumb on the scale for any one technology. In addition, to the extent the Commission entertains complaints from wireless providers that they face unique and discriminatory burdens at the local level, it must consider the full range of obligations imposed on other providers, particularly the franchise fee that cable operators generally pay as a condition of using the public rights-of-way to deploy cable facilities.

Streamline Section 214 Discontinuance. NCTA supports the Commission's efforts to promote the transition to IP-based networks by streamlining the Section 214 discontinuance requirements for all providers on a technology neutral basis. The Commission should, however, ensure that any discontinuance is carried out in a manner that avoids harm to other parties. In particular, LECs should continue to have an obligation to provide notice to wholesale customers before discontinuing any service purchased by a wholesale provider.

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

INTRODUCTION 1

I. THE RECORD SUPPORTS TARGETED STEPS TO FACILITATE POLE ATTACHMENTS 2

A. The Commission Can Take Several Specific Actions to Speed Deployment 3

1. The Commission Should Take Steps to Constrain Excessive Pole Attachment Requirements and Costs 3

a) The Commission Should Streamline Requirements for Common Deployments 3

b) The Commission Should Streamline Requirements for Short Line Extensions 4

c) The Commission Should Reaffirm That Cable Operators Have the Right to Share Utility Easements 5

d) The Commission Should Require Utilities to Make Available Schedules of Common Charges 6

2. Procedural Improvements to the Pole Attachment Complaint Process Can Streamline Deployment 7

3. The Commission Should Exercise Its Section 253 and Title VI Authority to Limit Unreasonable Rates for Attachments to Municipal Poles 8

B. The Commission Should Reject Electric Utilities' Proposals that Would Increase Costs and Undermine Broadband Deployment 11

1. The Commission Should Reject the Electric Utilities' Demands for Higher Pole Attachment Rates 11

2. The Commission Should Reject the Proposal to Require Removal of Existing Network Facilities 13

II. THE COMMISSION SHOULD ALLOW FOR INPUT AND RECOMMENDATIONS FROM THE BDAC BEFORE ADDRESSING ONE TOUCH MAKE-READY ISSUES 13

A. NCTA Supports Additional Streamlining of Access to Poles in Ways that Balance the Interests of All Stakeholders 14

B. One Touch Make-Ready Proposals Raise Significant Concerns and Are Inconsistent with Statutory Requirements Regarding Attachers' Control Over Their Own Facilities....16

C. The Commission's Existing Pole Attachment Procedures Can Be Made More Effective Without Being Completely Overhauled....21

III. THE RECORD SUPPORTS TARGETED STEPS TO FACILITATE DEPLOYMENT IN PUBLIC RIGHTS-OF-WAY....23

A. The Record Supports Commission Action to Constrain Excessive Fees and In-Kind Compensation Requirements on Broadband Providers....23

B. The Record Supports Limits on the Use of Construction Moratoria and Other Unwarranted Constraints on Deployment of Facilities or Provision of Services....26

IV. THE COMMISSION SHOULD TAKE A HOLISTIC APPROACH THAT FULLY CONSIDERS THE INTERESTS OF WIRELINE AND WIRELESS PROVIDERS....28

V. REFORM OF THE SECTION 214 DISCONTINUANCE PROCESS SHOULD REMOVE BURDENS WITHOUT HARMING OTHER PROVIDERS....30

CONCLUSION....32

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Infrastructure Development by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA) submits its reply comments in the above-referenced proceedings.[1] The voluminous record in these proceedings presents many opportunities for the Commission to take steps that will promote broadband deployment, some of which are relatively straightforward and others quite complex. In these reply comments, NCTA encourages the Commission to prioritize actions that can be accomplished relatively quickly and without undue harm to any party, while deferring action on those items that are more complex and would benefit from the input of the Broadband Deployment Advisory Committee (BDAC).

INTRODUCTION

The challenge facing the Commission in these proceedings is to determine how best to streamline obstacles to deployment while balancing a wide variety of legitimate and important interests raised by the parties. NCTA suggests that the best way for the Commission to proceed is to focus on identifying steps that will promote broadband deployment by all types of providers without placing a thumb on the scale in favor of any particular technology. Specifically, the

---

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Notice*); *Accelerating Wireless Broadband Deployment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (*Wireless Notice*).

record supports a number of actions the Commission could take (e.g., prohibiting unwarranted engineering and application fees imposed by pole owners) that enjoy broad support in the record and that would facilitate the pole attachment process in ways that would promote broadband deployment. Similarly, there are a variety of actions the Commission could take that would ease the burdens on broadband deployment that have been imposed by some state and local governments (*e.g.*, preempting unreasonable restrictions on certain construction techniques). The Commission also should take steps to streamline the Section 214 discontinuance process to facilitate the transition to IP-based networks, but in a manner that does not harm other parties. In particular, incumbent LECs should be required to continue providing appropriate notice to wholesale customers before making any changes to the services they are purchasing so as to protect the end users that rely on such services.

The record also makes clear that certain proposals, particularly "one touch" make-ready policies to govern pole attachments, are too complex and too controversial for the Commission to address at this time. The one touch regimes that have been put in place in some areas have been fraught with problems because they fail to protect the rights of existing networks and the one touch proposals advanced in the opening comments do not sufficiently address these concerns. For these issues, the Commission should await recommendations from the BDAC before deciding whether, and how, to proceed.

I. THE RECORD SUPPORTS TARGETED STEPS TO FACILITATE POLE ATTACHMENTS

NCTA supports the Commission's goal of streamlining the pole attachment process and reducing the associated costs to achieve faster and more efficient deployment of broadband facilities. The record demonstrates that make-ready costs and delays present significant obstacles to deployment, but it also reveals a number of steps, both procedural and substantive,

that the Commission can take immediately to facilitate faster and more efficient pole attachments.

A. The Commission Can Take Several Specific Actions to Speed Deployment

1. The Commission Should Take Steps to Constrain Excessive Pole Attachment Requirements and Costs

Several of NCTA's suggestions for pole attachment clarifications and reforms to promote infrastructure deployment can be adopted with little or no controversy.[2] As described below, the record supports adoption of NCTA's four recommendations to: (1) expedite common deployments by eliminating unnecessary studies and approvals; (2) facilitate competition by streamlining requirements for short line extensions; (3) reaffirm a cable operator's right to share utility easements; and (4) increase transparency and predictability of make-ready and other attachment expenses.

a) The Commission Should Streamline Requirements for Common Deployments

As NCTA and other parties explained in initial comments, the Commission can promote broadband deployment by prohibiting pole owners from requiring prior approval or unnecessary engineering studies for overlashing and other common configurations.[3] Cable operators for decades have safely overlashed fiber and advanced electronics to their strand, upgraded their communications service offerings, and deployed associated electronics without any untoward burden on the poles.[4] Yet, some pole owners are charging "significant engineering fee[s] upfront

---

[2] NCTA Comments at 4-12. Except as otherwise noted, all references to "Comments" in this pleading refer to comments filed in WC Docket No. 17-84.

[3] *See* NCTA Comments at 5-7; Comments of the American Cable Association at 9-10, 30-31, 40; Charter Comments. at 36-37.

[4] The California Public Utility Commission's Comments include the factually inaccurate allegation that a fire in Guejito was caused by Cox Communications' installations. *See* CPUC Comments at A-1. The CPUC included those same allegations in a draft Order Instituting Investigation and Order Instituting Rulemaking ("OII/OIR"),

for each pole just to provide [ ] an estimate of the make-ready cost," regardless of the type of proposed attachment.[5] As Charter noted, some pole owners require "full loading studies for every pole in an application, no matter how trivial the size or weight of the new attachment or stout the pole," including for overlashing.[6] ACA and NTCA have each described how such escalating demands and costs for access have constrained broadband deployment, particularly in rural areas; driven operators and their customers to bear the costs of undergrounding (even where more economical aerial capacity could have been made available); and diverted resources from broadband expansion to artificially inflated pole demands.[7] At a time when electric utilities complain of the burden of processing applications[8] and the lack of available qualified workforce to accommodate attachment requests,[9] a simple way to promote rapid deployment *and* ease the burden on electric utilities would be to clarify that pole owners may not require unnecessary analysis or pole-by-pole engineering studies, or additional authorizations for common installations and configurations or for overlashing fiber or other common equipment.[10]

b) The Commission Should Streamline Requirements for Short Line Extensions

NCTA requested in its comments that the Commission streamline requirements for one common installation that can serve broadband deployment and competition in the business data

---

but, after Cox refuted them, the CPUC deleted the allegations from its final OII/OIR draft. Accordingly, the Commission should disregard the same allegation in the CPUC's earlier comments filed with the Commission on June 15, 2017.

5 ACA April 3, 2017 *Ex Parte* at 3.

6 Charter Comments at 36 n.91.

7 ACA April 3, 2017 *Ex Parte* at 2-4; Comments of NTCA—The Rural Broadband Association at 4-9.

8 *See* Comments of Ameren Corporation, *et al*. at 12; Comments of the Edison Electric Institute (EEI) at 20-28; Comments of the Coalition for Concerned Utilities (CCU) at ii-iii, 22-25.

9 *See* CCU Comments at 25-26; EEI Comments at 23; Comments of ITTA—The Voice of America's Broadband Providers at 27.

10 *See* NCTA Comments at 5-7.

services (BDS) market: rapid deployment of short line extensions.[11] Applications for such projects are necessarily limited in scope and generally do not present the logistical and administrative difficulties that may be associated with large order applications. Yet, as some commenters note, even very small pole attachment orders can take a year or more.[12] Adopting an accelerated time frame for review and make-ready for these small, but important, projects will support the Commission's goals of promoting robust competition in BDS and increasing investment in broadband infrastructure.[13]

c) The Commission Should Reaffirm That Cable Operators Have the Right to Share Utility Easements

As explained in NCTA's initial comments, the Commission should refute recent refusals by electric utilities to recognize the easement rights that cable operators utilize in deploying broadband and other services.[14] Electric utilities have recently revived the archaic notion that cable operators must obtain specific easement rights rather than relying on utility easements as authorized by the Cable Act, thus creating further unnecessary delay and cost for cable deployment.[15] By reaffirming cable operators' rights under Section 621 to access any compatible easement within their franchise areas, including those used by a utility, the Commission will further promote the deployment of advanced telecommunications capability to all Americans and remove barriers to infrastructure investment.[16]

---

[11] *See* NCTA Comments at 7-8 (proposing accelerated processing of projects that require attachment to 30 or fewer poles); ACA Comments at 41-44.

[12] NTCA Comments at 5; *see also*, ACA Comments at 18-19 (noting that even small pole attachment orders are unnecessarily delayed).

[13] *See* NCTA Comments at 7-8; ACA Comments at 18-19, 41-44.

[14] NCTA Comments at 8-11.

[15] *See* CCU Comments at 13 (proposing that time needed to acquire easement rights should be cause to stop the make-ready clock for pole attachments); Comments of the Illinois Electric Cooperative at 6-8 (identifying acquisition of easement rights for communications purposes as a hurdle to rural deployment).

[16] 47 U.S.C. §§ 541(a)(2); 1302(a).

d) The Commission Should Require Utilities to Make Available Schedules of Common Charges

The record supports the Commission's proposal to require pole owners to publish a schedule of make-ready fees and other common charges.[17] The electric utilities object to posting a schedule of their own rates for common make-ready tasks, going so far as to argue that policing make-ready charges is "beyond the Commission's purview and expertise."[18] The electric utilities are wrong. The Commission has repeatedly exercised its statutory responsibility under Section 224 to assure that all rates, terms and conditions of pole attachments – including those for make-ready – are just and reasonable.[19] NCTA recognizes that make-ready and other charges for accessing poles may vary by utility, but that fact does not preclude a utility from posting its schedule of itemized rates for individual tasks, nor would such posting impose a burden on utilities that outweighs what they see is a "limited" benefit.[20] Comments demonstrate that the availability of such charges can expedite network planning for upgrades and extensions, as well as enhance pole owners' accountability, reduce disputes, and help create market forces that will pressure charges down to "just and reasonable" levels for the type of work performed.[21] Accordingly, the Commission should continue its history of overseeing pole owners' make-ready and other charges and adopt its proposal to require pole owners to publish a schedule of common charges.

---

[17] *See* NCTA Comments at 11-12; NTCA Comments at 7-8; Lightower Comments at 5-6, 13; Comments of Lumos Networks Inc., Lumos Networks of West Virginia, Inc. and Lumos Networks LLC at 12-14.

[18] Joint Comments of CenterPoint Energy Houston Electric, LLC, Dominion Energy Virginia, and Florida Power & Light Company at 21.

[19] *See, e.g., Texas Cable and Telecomms. Ass'n v. GTE Southwest, Inc.*, Order, 14 FCC Rcd 2975, 2984-85 ¶ 32 (CSB 1999), *aff'd*, 17 FCC Rcd 6261, 6265 ¶ 11 (2002); *Texas Cable & Telecomms. Ass'n v. Entergy Servs.*, Order, 14 FCC Rcd 9138, 9140, 9143 ¶¶ 5-14 (CSB 1999); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 72-73 (1979).

[20] *See* Ameren *et al*. Comments at 45-47.

[21] *See* NCTA Comments at 12; ACA April 3, 2017 *Ex parte* at 2-3; NTCA Comments at 8.

2. Procedural Improvements to the Pole Attachment Complaint Process Can Streamline Deployment

The record also supports adopting procedural reforms to the Commission's existing pole attachment complaint process that will increase transparency and speed deployment.[22] As NCTA explained in its initial comments, and in its petition for reconsideration of the *Part 32 Order*, ensuring access to pole cost data is critical to ensure that attaching parties are able to access the information necessary to confirm that pole attachment rates are consistent with the Commission's rules.[23] Access to pole cost data will also provide many of the same benefits as access to pole-owners' make-ready fees, such as enabling providers to better plan for and budget upgrades and extensions and decreasing the likelihood of disputes regarding pole attachment rates.

In addition, there is broad support for the adoption of a shot-clock for pole attachment complaints.[24] While the Commission's rules should continue to promote informal resolution of pole attachment disputes as the preferred outcome, it remains essential that parties know that formal complaints will be promptly resolved.[25] Including a 180-day (or shorter) shot-clock will

---

[22] Contrary to the suggestion of some electric utilities (*see* CCU Comments at 19), there is no need to create a new procedure for FCC complaints by new entrants against incumbent cable providers (or other attachers). There is no evidence of a need that cannot be met with existing pole attachment agreements. Moreover, an existing attacher does not "own or control the pole" and thus there is no basis for such a complaint under Section 224.

[23] NCTA Comments at 20-21; *Comprehensive Review of the Part 32 Uniform System of Accounts*, WC Docket No. 14-130, Petition for Reconsideration of NCTA – The Internet & Television Association at 11-20 (filed June 5, 2017) ("NCTA Part 32 Petition"); *see also*, Comcast Comments at 27-29 (explaining how access to pole cost data allows for resolution of rate issues in a faster and more cost-effective manner without the need to resort to the Commission's complaint process).

[24] *See* Comments of Lightower Fiber Networks at 16; Ameren *et al*. Comments at 58-61; CenterPoint *et al*. Comments at 38; Comments of USTA at 19-20; NTCA Comments at 9; ACA Comments at 51-53.

[25] NCTA Comments at 21; *see also*, NTCA Comments at 9-10 (a broadband provider understandably must accede to unreasonable rates, terms, and conditions for make-ready work if it is approaching a deadline that simply cannot wait on indeterminate resolution of a complaint).

provide attaching entities the certainty critical to planning future deployment, and will serve the interests of all types of broadband providers.

3. The Commission Should Exercise Its Section 253 and Title VI Authority to Limit Unreasonable Rates for Attachments to Municipal Poles

The municipal electric utilities assert that Section 224 exempts them from any of the proposed pole attachment regulations the Commission proposes.[26] The Commission recognized that Section 224 does not apply to such entities.[27] However, municipal electric utilities are municipal entities with independent obligations under Sections 253 and 622 of the Communications Act. Section 253 requires that fees assessed for use of the public right-of-way must be "fair and reasonable," "competitively neutral and nondiscriminatory," and not "materially inhibit" a provider from "compet[ing] in a fair and balanced legal and regulatory environment."[28] Section 622 caps the fees that are assessed on franchised cable operators, and specifically includes "any tax, fee, or assessment of any kind."[29] Fees of general applicability are excluded from this cap, including any "tax, fee, or assessment imposed on both utilities and cable operators," but assessments of general applicability are not excluded if they are "unduly discriminatory against cable operators or cable subscribers" as would be the case with pole attachment fees.[30]

---

[26] American Public Power Comments at 8-14.

[27] *Wireline Notice*, ¶ 30.

[28] 47 U.S.C. § 253(c); *In the Matter of California Payphone Ass'n Petition for Preemption of Ordinance No. 576 Ns of the City of Huntington Park, California Pursuant to Section 253(d) of the Commc'ns Act of 1934*, 12 FCC Rcd 14191, 14206 ¶ 31; *see also, TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (effective prohibition of service requires consideration of whether a regulation will materially inhibit the provider's ability to "compete in a fair and balanced legal and regulatory environment").

[29] 47 U.S.C. § 542(g)(2)(A).

[30] *Id*.

Cable operators have historically found that the rates charged by municipal electric utilities are significantly higher than rates charged by utilities regulated pursuant to Section 224.[31] Indeed, cable operators are not alone. As one commenter stated, "[i]t is no secret that would-be attachers frequently encounter difficulties in access to poles owned by [municipalities, electric cooperatives, and railroads], for instance, through being subject to predatory pricing and timelines being ignored."[32] Moreover, municipal pole owners have been known to cause such significant delays that broadband providers have abandoned fiber deployment plans, directly harming would-be broadband subscribers.[33]

As the Commission has repeatedly held, pole attachment rates must be cost-based to be reasonable.[34] While the municipal electric utilities claim that the Commission's rate is artificially low and amounts to a subsidy,[35] that position has been refuted repeatedly by the

---

31 NCTA Comments at 32-33; *see also,* Comcast Comments at 23-24 (providing examples of average pole rates charged by municipalities and cooperatives that are more than double the average pole rates charged by ILECs and investor owned utilities).

32 ITTA Comments at 31.

33 *See* ACA April 3, 2017 *Ex parte* at 4.

34 *See, e.g., Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5296 ¶ 127 (*2011 Pole Attachment Order*) ("[S]ection 224(d)(1) defines a just and reasonable rate as ranging from a statutory minimum based on the additional costs of providing pole attachments to a statutory maximum based on fully allocated costs."); *id*. at 5300 ¶ 140 ("Identifying reasonable, albeit different interpretations of the ambiguous term 'cost' that are consistent with the statute thus provides an upper and lower limit on the possible telecom rates that would be consistent with Section 224(e).").

35 *See* American Public Power Comments at 23-28; Comments of CPS Energy at 5-10.

Commission,[36] courts,[37] state public service commissions,[38] and consumer advocates.[39] Moreover, several states already mandate that their municipal pole owners use the Commission's rate formula to determine pole attachment rates.[40] There is no justification to revisit that issue here, especially considering that the goal of the *Notices* is to adopt policies that promote the

---

[36] *See, e.g., 2011 Pole Attachment Order*, 26 FCC Rcd at 5321, ¶183 ("the lower-bound telecommunications rate, the new telecom rate, and the cable rate each are fully compensatory to utilities because these rates meet or exceed incremental cost, and satisfy all constitutional compensation requirements"); *Implementation of Section 703(e) of the Telecommunications Act of 1996,* 13 FCC Rcd 6777, 6795-96 ¶ 32 (1998) ("We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate."), *aff'd in relevant part, NCTA v. Gulf Power,* 534 U.S. 327 (2002); *Alabama Cable Telecomm's Ass'n. v. Alabama Power Co.*, FCC 01-181, 16 FCC Rcd 12209, 12236 ¶ 60 (2001) ("Respondent's repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation.").

[37] *See, e.g., FCC v. Florida Power Corp*., 480 U.S. 245, 253–54 (1987) (finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory"); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370–71 (11th Cir. 2002) *cert. denied*, 124 S. Ct. 50 (2003) ("[A]ny implementation of the [Commission's cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation.").

[38] *See, e.g., Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998); *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies*, Order Directing Utilities to Cancel Tariffs, Case 01-E-0026, 2002 N.Y. PUC LEXIS 14, at *4 (Jan. 15, 2002); *Consideration of Rules Governing Joint Use of Utility Facilities & Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Oct. 2, 2002); *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability Of Cable Tariff Rate For Pole Attachments By Cable Systems Providing Telecommunications Services & Internet Access*, *Docket No. 05-06-01*, Decision, 2005 Conn. PUC LEXIS 295, at *11-12 (Dec. 14, 2005); *Rulemaking to Amend & Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use & Safety (AR 506) & Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles & Facilities (AR 510),* Order No. 07-137, 2007 Ore. PUC LEXIS 115, at *24 (Apr. 10, 2007); *Cablevision of Boston v. Boston Edison Co*., Mass. Docket No. D.T.E. 97-82 at 12, 45, 46 (Apr. 15, 1998) (reducing pole rental fees and holding that cable rate will "not require an adjustment of other [utility] rates").

[39] *See, e.g., Implementation of Section 224 of the Act*, Reply Comments of NASUCA, WC Docket No. 07-245 (April 22, 2008) at 4 -5 (In endorsing the cable rate as the appropriate unified pole rate, the National Association of State Utility Consumer Advocates explained that "[t]his rate is the rate that should be used for all pole attachments, regardless of the exact service provided over the attachment, and regardless of the identity of the attacher. . . . Equally important, the Commission must not increase the rate paid by broadband service providers because this would be contrary to 'the nation's commitment to achieving universal broadband deployment and adoption.'").

[40] *See, e.g.,* Cal. Pub. Util. Code §9512; MO Rev. Stat. §67.5104.2; and *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety*, AR 506, Order, (Pub. Util. Comm'n 2007) (Adopting "cable rate formula" for all pole owners, including municipalities).

deployment of broadband facilities. Instead, the Commission should establish a presumption that pole attachment rates charged by municipal electric utilities, in order to be "fair and reasonable" and "competitively neutral and nondiscriminatory" under Section 253, and not "unduly discriminatory" under Section 622, must not exceed the Commission's cost-based pole rate formula.

B. The Commission Should Reject Electric Utilities' Proposals that Would Increase Costs and Undermine Broadband Deployment

The initial comments in these dockets make clear that there are a significant number of complex issues facing the Commission in its efforts to increase broadband deployment in the United States. While most parties advocate solutions that would ease the burdens on deployment or at least preserve the status quo, the electric utilities advocate for higher pole rents and additional burdens on attachers, both new and existing, that would discourage rather than promote broadband deployment. For the reasons explained below, the Commission should reject those proposals.

1. The Commission Should Reject the Electric Utilities' Demands for Higher Pole Attachment Rates

The electric utilities seek to re-litigate the Commission's *2011 Pole Attachment Order* and *2015 Pole Attachment Reconsideration*[41] and demand higher pole attachment rates—some far higher than the Commission's pre-2011 telecom rate.[42] The electric utilities also seek the authority to impose: (1) additional charges on attachers for drafting, administering, and

---

[41] *2011 Pole Attachment Order*, 26 FCC Rcd 5240; *Implementation of Section 224 of the Act*, Order on Reconsideration, 30 FCC Rcd 13731 (2015) (*2015 Pole Attachment Reconsideration*).

[42] *See* Joint Comments of Alliant Energy Corporation, WEC Energy Group, Inc., and XCEL Energy Services Inc. at 40; Ameren *et al*. Comments at 47-56; CCU Comments at 34; CenterPoint *et al*. Comments at 22-24; EEI Comments at 41-44; CPS Energy Comments at 5-9; APPA Comments at 21-28. Some electric utilities propose that the Commission adopt a rate formula currently being socialized by the TVA that would use long–discredited formulas that disproportionately assign costs to third-parties and would impose rates that are higher than the Commission's pre-2011 telecom rate. *See* CCU Comments at 39.

enforcing pole attachment agreements, processing applications, "overseeing" attachment activity, issuing bills for attachment activity, performing "tasks they would not have to perform if it were not for the presence of communications attachments"; and (2) additional fees in the guise of sanctions and penalties for supposed non-compliance with pole agreements.[43] Indeed, the electric utilities even threaten to hinder broadband deployment if the Commission does not allow for increased pole rents, stating that they may install shorter poles and then deny access to new attachments that would require a pole replacement.[44]

The Commission should reject any demands by the electric utilities for increased pole attachment rates and fees[45] and remind the electric utilities once again that double recovery of costs is not allowed.[46] As explained above, there is no question that the Commission's current rules enable utilities to charge rates and fees that compensate them for the costs incurred in providing access to poles. Therefore, any increase is unwarranted. Also, the Commission should permanently defuse threats to hold broadband deployment hostage by declaring that if a utility would change out a pole to meet its own needs, then its refusal to change out a pole for an attaching entity that is willing to pay for a new pole to accommodate its attachment is *per se* discriminatory and a violation of Section 224.[47]

---

[43] *See* CCU Comments at 20-21, 37-39; EEI Comments at 9-10, 31; Comments of Puget Sound Energy (PSE) at 6, 12-13.

[44] *See* Ameren *et al*. Comments at 50; CPS Energy Comments at 9.

[45] *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd at 6795-96 ¶ 32 (1998) ("We conclude, pursuant to Section 224(b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate."), *aff'd in relevant part, NCTA v. Gulf Power*, 534 U.S. 327 (2002).

[46] NCTA Comments at 11-12; s*ee Texas Cable and Telecomms. Ass'n v. GTE Southwest, Inc.*, Order, 14 FCC Rcd 2975, 2984-85 ¶ 32 (CSB 1999), *aff'd*, 17 FCC Rcd 6261, 6265 ¶ 11 (2002); *Texas Cable & Telecomms. Ass'n v. Entergy Servs.*, Order, 14 FCC Rcd 9138, 9140, 9143 ¶¶ 5-14 (CSB 1999).

[47] The same rule should apply to municipal utilities in order to uphold the nondiscrimination requirements of Section 253 and 622.

2. The Commission Should Reject the Proposal to Require Removal of Existing Network Facilities

The Commission also should reject the proposal from some electric utilities that cable operators be required to remove so-called "unused" coaxial cable and fiber from systems that have been upgraded.[48] The electric utilities claim that such a requirement will promote attachments by new entrants.[49] However, there is no evidence of widespread inability of new entrants to build networks where there is existing hybrid fiber-coax cable plant, nor is there any justification for singling out cable operators. The same, or greater, effects could be gained from electric utilities replacing legacy open wire electric facilities with triplex or from ILECs removing "unused" legacy copper plant. Any of these efforts would result in significant disruption to the providers' existing services and essentially require a rebuild of entire existing networks at significant cost to the providers and consumers, but with no appreciable benefit to anyone. Any proposal to require removal of existing facilities should be rejected. If a proposed attachment requires make-ready or a stronger pole, the new attacher should be responsible for covering those costs, just as existing operators were responsible for prior make-ready and pole replacements. As provided in Section 224(i), existing attachers "shall not be required to bear any of the costs of rearranging or replacing its attachment" resulting from an additional attachment by another entity.

II. THE COMMISSION SHOULD ALLOW FOR INPUT AND RECOMMENDATIONS FROM THE BDAC BEFORE ADDRESSING ONE TOUCH MAKE-READY ISSUES

While the issues noted above lend themselves to prompt resolution by the Commission, other issues identified in the *Notices* present more complex issues. In particular, there are still

---

[48] *See* CCU Comments at 15-17; EEI Comments at 31; PSE Comments at 11.

[49] *See* CCU Comments at 15-17; EEI Comments at 31; PSE Comments at 11.

many significant unresolved issues regarding one touch make-ready. As described by NCTA and a number of other parties, current versions of one touch make-ready that have been adopted in some locations do not provide appropriate protection for the rights of existing attachers and the proposals advanced in the record do not sufficiently address these concerns. Given that there are still a number of very important issues where further discussion is necessary, the Commission should await a report from the BDAC before considering any next steps in connection with one touch make-ready.

A. NCTA Supports Additional Streamlining of Access to Poles in Ways that Balance the Interests of All Stakeholders

NCTA supports the Commission's objective to streamline pole attachment make-ready processes and to gain efficiencies for large scale construction and coordination among multiple parties. Unfortunately, the record reflects a great deal of fruitless finger-pointing and a failure to ground proposals in the essential principle that existing attachers must be provided with adequate prior notice of *all* planned work (not just "complex" projects or those that someone else thinks would cause outages) and a meaningful opportunity to perform the required modifications and protect their plant and customers from unnecessary disruption. The blame game has generated proposed solutions that do not address real problems in the field or strike the necessary balance between the goals of promoting broadband infrastructure deployment by new attachers and safeguarding the reliability of existing networks that the Commission rightly demands.[50]

In assessing the need for new rules, it is important for the Commission to understand and appreciate the complexity of the process that is required to safely attach facilities to poles and not to rely on an oversimplified portrait of what occurs in the field today. The typical attachment

---

[50] *See Wireline Notice* at ¶ 18 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at ¶ 61).

process will include representatives of (or contractors specifically hired for) each existing network in order to assess each pole configuration, evaluate the impact that each change may have on its own specialized networks, take advantage of the opportunity to modify its own facilities, and verify that work by others does not harm its network. Different types of facilities have different make-ready needs and require crews with different skills. For example, pole owners have specialized crews and equipment for pole replacements. Different workers and unions perform work on communications facilities than on electric facilities. Certain work – such as node relocation or protecting backhaul to a live wireless network – requires workers with specialized expertise.

Each service provider participating in such a process knows its own network. The cable provider, for example, knows its network, nodes, design, and construction plans. When providers contract for work to be done on their behalf, the agreements are made with contractors that possess the appropriate specialized qualifications, the network owner has privity of contract with the contractor, and the contract has appropriate warranties, indemnities, insurance, quality assurance measures, and payment arrangements to assure safe and proper construction. Today, the varying needs of the different stakeholders are met by coordinating site visits by the crews appropriate for each type of work when joint inspections are required and by sequencing work in the order that makes the most sense for a specific project.

These contractual arrangements are reinforced by statutory provisions and the Commission's rules. Section 224(h) requires pole owners to give an entity with an existing attachment a reasonable opportunity to add to or modify its facilities before the owner modifies the pole.[51] Section 224(i) provides that existing attachers "shall not be required to bear any of

[51] 47 U.S.C. § 224(h).

the costs of rearranging or replacing its attachment" resulting from an additional attachment by another entity.[52] The Commission's pole attachment rules provide prescribed time periods for different steps of the process to take place, but those rules are premised on proper notice to existing attachers, the sequencing of work, and procedures that assure that an existing communications network would not incur costs resulting from an additional attachment by another entity. There may be room to improve these procedures, but as we explain in the next section, one touch make-ready is not the right approach at this time.

B. One Touch Make-Ready Proposals Raise Significant Concerns and Are Inconsistent with Statutory Requirements Regarding Attachers' Control Over Their Own Facilities

Before considering wholesale changes to the current make-ready environment, all parties and the Commission must engage in a far deeper consideration of the process by which networks coexist on common support structures and the needs and interests of the multiple stakeholders involved. A fundamental problem with one touch make-ready, including the proposals advanced by Google and others, is that it strips existing attachers of authority to control their own facilities and ensure the safety and reliability of their networks.[53] It assumes that a contractor selected by a new entrant (or, in Google's formulation, by one of the pole owners) can ensure that an existing network owner will receive all proper notices, understand what may adversely affect existing service, ensure that the work will be performed to all network requirements, and ensure that all costs will be properly borne by the new entrant.

But the reality under one touch is quite different. For example, Charter "has experienced significant difficulties with poor or nonexistent recordkeeping, insufficient or inaccurate notices,

---

[52] *Id*. § 224(i).

[53] *See, e.g.*, Google Fiber Comments at 5-6; Next Century Cities Comments at 6.

shoddy work, service disruptions and threats to public safety, and inadequate opportunities to inspect or remedy damage to [its] facilities."[54] In Kansas City, Charter's inspection of work performed by a third-party contractor hired by Google Fiber revealed "extensive and repeated violations of NESC standards – including hundreds of instances in which contractors improperly handled Charter's facilities during the make-ready process, damaging those facilities and in hundreds of locations requiring major repairs and causing service outages."[55] Similarly, Comcast found that 40% of the make-ready work performed by third-party contractors hired by new attachers did not comply with NESC requirements.[56]

Under Google's proposed formulation of one touch, the contractor chosen by the utility determines what make-ready work is "simple" and what is "complex," or likely to cause damage or a service outage. First of all, there is no statutory basis for that distinction. Moreover, it is not realistic to expect that a contractor with no relationship to the cable provider and no knowledge of the cable provider's network, nodes, design, or construction plans, will be able to accurately make such a determination. As Charter has experienced in San Antonio, "contractors for new attachers routinely misclassify as 'routine' make-ready work that could jeopardize the integrity of Charter's network and cause a service disruption or outage."[57] In fact, Charter estimates that 18-20% of the make-ready work contractors have designated as "routine" is actually complex.[58] And there is nothing in the one touch proposals that provides for indemnity for damage caused by service interruptions, advance deposit of funds necessary to promptly pay for work and

---

54 Charter Comments at 39.

55 *Id.* at 43.

56 Comcast Comments at 21-22.

57 Charter Comments at 41.

58 *Id.*

repairs, or penalties or disincentives for damaging an existing network or causing a service outage.[59] Indeed, even when an existing attacher inspects the work and notifies the new attacher to correct the problems discovered, the remedy proposed by one touch advocates would be to have the same inexpert contractor be held responsible for correcting the problem it created in the first place.

It is telling that even the electric utilities that support one touch are only willing to support it for *other entities'* facilities.[60] The electric utilities demand that one touch only apply in the communications space, asserting that their electric networks are complex and can only be adequately protected by them.[61] Cable networks are no less complex and no less in need of adequate protection than electric facilities. Beyond the loss of customer goodwill that occurs any time there is a network outage, cable systems provide critical broadband access, voice service, including 911 service, and wireless backhaul. As Charter explains, "[n]egligent work conducted by a new attacher or its contractor can become a public safety hazard, as it can compromise the existing attacher's essential services, including emergency 911 services."[62] Accordingly, construction involving these facilities must be done properly and with care because service outages or disruptions have significant negative impacts on the providers and the public at large.

---

[59] The electric utilities correctly highlight this deficiency in one touch and request including an indemnity requirement for all incumbent lines. *See* Alliant *et al*. Comments at 33; Comments of the Utilities Technology Council at 14. As Charter notes, without any contractual relationship, the only way to resolve disputes arising from this type of make-ready work is through tort litigation, which is inevitably costlier and less efficient. *See* Charter Comments at 51.

[60] *See* Alliant *et al.* Comments at 30; Ameren *et al*. Comments at 8-9; CCU Comments at 28-29; CenterPoint *et al*. Comments at 11-13; EEI Comments at 30-34.

[61] *See* Alliant *et al.* Comments at 30; Ameren *et al*. Comments at 8-9; CCU Comments at 28-29; CenterPoint *et al*. Comments at 11-13; EEI Comments at 30-34. In fact, not all pole owners are even willing to approve contractors for work in the communications space. *See* Alliant *et al*. Comments at 31; Ameren *et al*. Comments at 9-11; CenterPoint *et al*. Comments at 13; EEI Comments at 30; PSE Comments at 5.

[62] Charter Comments at 48.

A cable provider cannot ensure the safety and reliability of its network if it is forced to rely on a third-party contractor that the cable provider did not choose or approve, that owes the cable provider no duty or warranty or agreed-upon insurance, and that has no contractual privity with, or liability to, the cable provider. Any provider's concerns about the security and reliability of its network cannot be alleviated by a contractor whose duty is to one of its competitors. Simply put, the third-party contractor has little incentive to protect the networks already attached to the pole. [63]

The Commission's policies have always been premised on the commonsense notion that each party maintains complete control over its own facilities.[64] As the Commission has recognized in the *2011 Pole Attachment Order*:

> Section 224(h) requires pole owners to give an entity with an existing attachment a reasonable opportunity to add to or modify its facilities before the owner modifies the pole. The Commission has long interpreted 'a reasonable opportunity' to mean that a 'utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to removal of facilities.' This 60-day standard adopted in 1996 continued a Commission policy that dates back to the Commission's *First Report and Order* implementing the Pole Attachment Act of 1978.[65]

Indeed, as Charter noted in its comments, the fundamental principle that each provider controls its own facilities "protects not only the providers themselves (who have an interest in ensuring the integrity of their plant against trespass and damage), but also consumers, who suffer from service degradations arising out of sloppy or negligent work, as well as the public more

---

63 *See* ITTA Comments at 28 (recognizing that "allowing contractors engaged by new attachers to move existing attachers' equipment without permission can lead to liability questions if something goes wrong, due to the lack of a contract between the new and existing attachers"); Charter Comments at 51 (noting that where "existing attachers lack any privity of contract with either the new attacher or the contractors performing work at their direction…there is no opportunity to use contractual methods, such as indemnification, to allocate the risks the attachment work creates").

64 *See* NCTA Comments at 13-14.

65 *2011 Pole Attachment Order*, 26 FCC Rcd at ¶ 31 (internal citations omitted).

broadly, which benefits when attachment work is performed safely and without imperiling emergency services such as E911."[66] One touch, as presently conceived, necessarily deprives an existing attacher of its statutory right to notice and an opportunity to add to or modify its own existing attachment before a pole is modified or altered and thus violates Section 224(h).[67]

Similarly, Section 224(i) provides that existing attachers "shall not be required to bear any of the costs of rearranging or replacing its attachment" resulting from an additional attachment by another entity.[68] Thus, while the various one touch proposals include requirements that the new attacher pay to repair damaged equipment, they fall short of Section 224(i)'s protections because they do not protect against the costs of service outages.

As NCTA described in its comments, any changes to the pole attachment process should, consistent with Section 224, be grounded in the principle that existing attachers must be provided with adequate prior notice of *all* planned work (not just "complex" projects or those that the new attacher thinks may cause outages) and a meaningful opportunity to perform the required make-ready work themselves. In order to assure that compensable work can proceed without interruption, the new entrant should be required to provide funding for such work in advance, to be drawn down as work progresses. Any contractor must be approved by the party that owns the facilities. A new entrant that performs work on facilities owned by another party should be required to accept full liability for improperly performed work and indemnify the existing attacher.

Ultimately, the record does not support changes as drastic as those suggested in the one touch proposals, nor has it produced any sufficiently detailed and developed proposal that

---

66 Charter Comments at 37.

67 47 U.S.C. § 224(h).

68 *Id.* § 224(i).

adequately protects all stakeholder interests.[69] For such a profound reform to fully account for field reality, to strike the necessary balance between the goals of promoting broadband deployment and safeguarding the reliability of existing networks, and to be successful, it should be developed first through the multi-stakeholder BDAC process. Accordingly, the Commission should refrain from considering any version of one touch make-ready until receiving the BDAC's recommendation and, depending on that recommendation, considering the issue in a further notice.

C. The Commission's Existing Pole Attachment Procedures Can Be Made More Effective Without Being Completely Overhauled

The fact that one touch make-ready is not ready for prime time does not mean the Commission can do nothing to promote more efficient access process. Despite the mandates of the existing process, the record clearly supports a need to decrease access costs and accelerate timelines.[70] Even the electric utilities acknowledge that they do not comply with the current timelines.[71] Some "companies have slowed broadband deployment or expansion efforts (and some have even abandoned builds) due to pole owners delaying attachments, [and] charging unreasonable make ready or rental fees."[72] In other instances, make-ready has become so expensive that some providers have chosen to underground instead and cut back on expansion.[73]

---

69 NCTA Comments at 13-17; ITTA Comments at 27-29.

70 *See* NTCA Comments at 4-5 (noting that "NTCA members have reported that make-ready can take a year or more[] for even very small orders (less than 100 pole attachments per year)"); ITTA Comments at 26-27 (providing an example of make-ready work that has been "backlogged for six years"); Charter Comments at 36-37 (noting that "significant delays in the buildout process can be caused by pole owners' failure to respond to or process applications within the prescribed timelines" of the Commission's existing rules).

71 *See* EEI Comments at 26-28; *see also*, Charter Comments at 36 (noting that some pole owners require a "pre" application not subject to any timeframe).

72 ACA April 3, 2017 *Ex parte* at 2 (also noting that make-ready costs have increased in recent years).

73 *Id*. at 3.

Other providers have faced such significant delays that they have been unable to meet build-out commitments.[74]

The Commission can readily improve the process by enforcing its current rules. If the electric utilities were held to current timelines, many of the most egregious examples of delay would be remedied.[75] NCTA's proposals in Section I above fit within the Commission's current rule structure and will all serve to accelerate less costly deployment. Limiting engineering and loading studies for common configurations and common activities, such as overlashing, eliminates unnecessary engineering, freeing pole owners to focus on activities that might otherwise run over the prescribed timeframes. Publishing make-ready fees and other common charges allows for more informed network planning, drives down costs, and facilitates compliance with existing access timelines for cost estimates and acceptance. Likewise, recognition of cable easement rights will avoid delays before the application process is even begun.

Participation in an electronic notification system can also be beneficial, especially in trying to coordinate work with multiple networks. As Charter noted in its comments, the National Joint Use Notification System ("NJUNS") has worked well to facilitate efficient make-ready, and pole owners that have refused to participate in such a system have exacerbated problems regarding make-ready notice and documentation.[76] Requiring use of an electronic notification system can help to minimize delays and reduce any burdens of coordination,

---

[74] *Id*. at 3.

[75] *See* NTCA Comments at 4-5; ITTA Comments at 26-27; Charter Comments at 36-37; CCU Comments at 24-26.

[76] Charter Comments at 43, 56.

provided that existing attachers have input into the selection and any subsequent changes to the electronic notification vendor.[77]

III. THE RECORD SUPPORTS TARGETED STEPS TO FACILITATE DEPLOYMENT IN PUBLIC RIGHTS-OF-WAY

State and local regulations can often make a substantial difference in whether, and how quickly, a provider is able to deploy broadband or telecommunications facilities. While most state and local governments recognize the value that new facilities and services deliver to their constituents, the record makes clear that many communities continue to impose obligations on providers that result in significant and unwarranted delay or expense on companies that seek to place facilities in the public rights-of-way. There is broad support in the record for the Commission to play a more assertive role in preempting state and local requirements that go too far in hindering new deployment. Below we address some specific types of requirements the Commission should focus on. The Commission has authority to implement each of these recommendations pursuant to its authority under Section 253[78] and, with respect to cable operators, under Title VI.[79]

A. The Record Supports Commission Action to Constrain Excessive Fees and In-Kind Compensation Requirements on Broadband Providers

One of the most significant concerns expressed in the record is the imposition of excessive fees on providers of broadband and telecommunications services, whether such

---

[77] *See* Charter Comments at 56; CCU Comments at 20.

[78] NCTA Comments at 23-27. As explained by NCTA and many other parties, the Commission should interpret Section 253 in a manner that would support preemption of any requirements that materially inhibit the provision of service, rather than a narrower interpretation that would support preemption only when there is a complete prohibition on the provision of service. *See, e.g., id*., at 29; Charter Comments at 22-24; Fiber Broadband Association Comments at 18-20; AT&T Comments at 71-72; CTIA Comments at 19-20; CCA Comments at 22.

[79] *See, e.g.*, NCTA Comments at 24; Charter Comments at 27-29.

services are provided by wireline or wireless providers.[80] As NCTA explained, cable operators have a particular concern regarding such fees because they already are required to pay a revenue-based franchise fee in connection with their provision of cable service.[81] That fee generally should be sufficient to cover the costs a municipality incurs in allowing the cable operator to place its facilities in the public right-of-way. As a result, the imposition of any broadband fee on cable operators, such as the revenue-based broadband fee assessed by Eugene, Oregon,[82] would provide the municipality with an unwarranted windfall.

There is strong support in the record for action by the Commission that would clarify that any fees imposed by state and local governments for use of the public rights-of-way should be based on the cost incurred, not the purported "fair market value" as determined by the municipality or the amount of revenue that a provider generates from its services.[83] NCTA agrees that the Commission should establish a policy limiting state and local government to cost-based fees when they provide access to public rights-of-way.[84]

Municipalities respond by arguing that the Commission has no ability to constrain the fees they charge, but these arguments are not compelling. For example, municipal advocacy groups make much of the historical description of such fees as "rent" and suggest that this precludes the Commission from taking any action to constrain such fees.[85] But Congress already

---

80 *See, e.g.*, Charter Comments at 22-23; CCA Comments at 17-21; CTIA Comments at 29-31. Parties raise similar concerns regarding demands from local governments for "in kind" compensation. *See, e.g.*, Comcast Comments at 9-10; CALTEL Comments at 17-18; Fiber Broadband Association Comments at 24.

81 NCTA Comments at 23-27.

82 *Id*. at 26-27, *citing City of Eugene v. Comcast of Or. II Inc.*, 359 Or. 528 (2015).

83 *See, e.g.*, CTIA Comments at 31-33; CCA Comments at 18-19; R Street Comments at 5-7.

84 As explained above, the principle that fees for access to municipal property should be cost-based should apply not just to public rights-of-way, but to municipally-owned poles as well.

85 Comments of National League of Cities, et al., WT Docket No. 16-421, attached to Letter from Stephen Traylor, NATOA, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed June 15, 2017) (NATOA Comments); *see also* League of Arizona Cities et al. Comments at 5-6, 9-10.

has placed constraints on the fees that can be charged through the plain language of Section 253(c), which limits municipalities to charges that are "fair and reasonable."[86] Nothing in that section or anywhere else in the Act precludes the Commission from defining that phrase, by rule or through a declaratory ruling.

Similarly, their argument that local governments are entitled to impose fees based on "facts in existence in any particular government"[87] does not preclude the Commission from establishing a general principle that such fees must be cost-based. Broadband providers are not looking for a free ride at the expense of local governments. NCTA acknowledges that local governments incur costs attributable to allowing companies to place facilities in the public rights-of-way and that they should be allowed to recover those costs from the providers that benefit from such use. But nothing about the "facts in existence in any particular government" should compel a provider to pay fees that exceed the costs attributable to its use of the public rights-of-way.

Beyond any constraints that should apply to such fees generally, cable operators should not be subject to any broadband fee for use of the public rights-of-way to the extent that they already pay a cable franchise fee that compensates the local government for the cost of providing access to the rights-of-way.[88] The Commission first adopted such a policy 15 years ago in the *Cable Modem Declaratory Ruling* and reiterated this policy in the 2015 *Open Internet Order*.[89]

---

86 47 U.S.C. § 253(c).

87 NATOA Comments at 21.

88 To this end, the Commission should act expeditiously to reinstate the "mixed-use network" rule recently vacated by the U.S. Court of Appeals for the Sixth Circuit. *See Montgomery Co., Maryland, et al. v. FCC*, 2017 WL 2961089 (6th Cir. July 12, 2017).

89 *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 ¶ 433 n.1285 (2015); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4849-50 ¶ 102 (2002), *aff'd, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005).

As explained by Charter, prohibiting a second set of fees on cable operators that provide broadband service "makes ample sense" because the cable franchise fully addresses any local government interest in "regulating the buildout in their rights-of-way, in ensuring public safety, avoiding disruptive construction, ensuring that providers have the requisite qualifications, and in obtaining reasonable compensation for use of public resources."[90] Accordingly, there is "no legitimate interest in assessing an *additional* franchise on services provided over the same facilities."[91]

B. The Record Supports Limits on the Use of Construction Moratoria and Other Unwarranted Constraints on Deployment of Facilities or Provision of Services

In addition to excessive fees, the initial comments also demonstrate significant concern regarding local policies that place an explicit or implicit moratorium on the use of certain types of equipment or construction techniques. Limits on the placement of aerial facilities represent a particular concern for both wireline and wireless providers.[92] Parties also express concern regarding lengthy delays in processing permits that are tantamount to a moratorium on new construction.[93]

In response to these concerns, municipal entities generally argue that the Commission has no authority to preempt local regulation of construction practices and that establishing one-size fits-all rules at the federal level is an unwise policy given the substantial variation in local circumstances.[94] NCTA appreciates the concerns raised by municipalities and it does not seek a

---

90 Charter Comments at 21-22.

91 *Id*. (emphasis in original).

92 *See, e.g.*, AT&T Comments at 74-75; CTIA Comments at 24-25; T-Mobile Comments at 10, 38.

93 *See, e.g.*, Comcast Comments at 7-8.

94 *See, e.g.*, Next Century Cities Comments at 11-12; San Francisco Comments at 6-7; League of Arizona Cities Comments at 13-14.

one-size-fits-all solution. Cable operators have a long track record of working with local governments on broadband deployment issues and most of these entities are working in the best interests of their residents to develop ground rules that strike an appropriate balance between enabling broadband deployment and protecting the public rights-of-way.

That said, the record suggests that concerns regarding some extreme practices, such as moratoria prohibiting any aerial construction, are sufficiently widespread that federal intervention may be warranted. Cable operators have faced local municipal moratoria that forbid them from even upgrading their existing aerial lines with fiber and advanced electronics, even as power, telephone, and other attachments remain above-ground. While we recognize that municipalities may have an interest in moving all aerial facilities underground, it should not be permissible for franchising authorities to restrict the technology or equipment that may be deployed when lines remain above-ground, nor should it be permissible for franchising authorities to place a moratorium or ban on technologies that require aerial installation.

Another category of requirements that have triggered strong concern from broadband and telecommunications providers are those that would require the provider to obtain prior approval from state or local officials before offering particular services or using particular technologies to provide those services. NCTA, for example, has raised concerns about a California requirement that a franchised cable operator must obtain additional authorization as a wireless carrier before deploying wireless equipment in the public right-of-way.[95] Similarly, CALTEL has raised concerns about a California prohibition on competition in areas served by rural LECs.[96] The Commission should make clear that regulations of this nature are not permissible.

---

[95] NCTA Comments at 28.

[96] CALTEL Comments at 13-16.

IV. THE COMMISSION SHOULD TAKE A HOLISTIC APPROACH THAT FULLY CONSIDERS THE INTERESTS OF WIRELINE AND WIRELESS PROVIDERS

NCTA and many other parties have taken the position that the Commission should promote deployment of all types of technologies by all types of providers, without placing a thumb on the scale in favor of any one type of technology or provider.[97] But achieving this policy goal in the context of access to poles and rights-of-way is complicated because different technologies require different uses of poles and rights-of-way and because the services provided with those technologies are subject to varying regulatory regimes.

Despite this complexity, many of the proposals that NCTA advocates above would be beneficial to broadband and telecommunications providers without regard to the technology they use. For example, requiring pole owners to post a schedule of fees or placing limits on the ability of municipalities to assess broadband fees would benefit all providers, not just wireline providers. Similarly, developing an accelerated review process for short pole runs to commercial locations would benefit wireline providers, but it also may be critical for wireless carriers as 5G is introduced and demand for dense fiber backhaul grows.

While there are many policies the Commission could adopt that would benefit all providers regardless of technology, many wireless carriers and their trade associations argue that they are uniquely subject to burdensome requirements at the local level and that the Commission should focus particular attention on these concerns to level the playing field with wireline providers.[98] In addressing these concerns, the Commission should take care not to view these issues too narrowly. As noted above, local governments have a legitimate interest in monitoring

---

97 Charter Comments at 4-8.

98 *See, e.g.*, CTIA Comments at 28; WIA Comments at 40-49.

the placement of facilities in the public rights-of-way, ensuring that any construction is done safely, and being compensated for costs that are reasonably attributable to this activity.

Local governments typically address these concerns by requiring a franchise or other authorization to access the public rights-of-way. A cable franchise addresses these concerns with respect to facilities placed by a cable operator throughout the right-of-way and at scale, even with respect to wireless equipment. But for a provider that solely provides wireless services and does not have a cable franchise, the local government must establish other mechanisms to meet its objectives. It is not discriminatory against wireless to impose a variety of cost-based fees on wireless providers for installing wireless facilities in the rights-of-way, without imposing the same fees cable operators installing facilities in the rights-of-way, when cable operators *already* pay to install their facilities – including any wireless components thereof – via their franchise fees.[99]

None of this is to suggest that the Commission should not take steps to streamline the process for deployment of wireless facilities, nor does NCTA advocate for continuing the onerous restrictions some localities place on wireless deployment in the rights of way.[100] Rather, the relevant point is that assessing whether a particular set of requirements discriminates against wireless providers requires a holistic view of the requirements that are imposed on other companies that place facilities in the public right-of-way. Failure to take such an approach would impede broadband deployment, undermine competition, and impair effective functioning of the marketplace.

---

[99] Unlike the typical cable franchise, wireless deployment in the right of way today is subject to a variety of local arrangements subject to a variety of fees and charges, such as individual site permits or hybrids of franchises and permits. *See* Crown Castle Comments at 34-35, 42-43 (recognizing the "patchwork" of regulations that differ from locality to locality). Any discrimination likely operates against the cable operators who are subject to a revenue-based fee.

[100] WIA Comments at 21.

V. REFORM OF THE SECTION 214 DISCONTINUANCE PROCESS SHOULD REMOVE BURDENS WITHOUT HARMING OTHER PROVIDERS

NCTA generally agrees with the Commission that streamlining the discontinuance requirements for all providers on a technologically neutral basis will encourage the transition to IP-based networks.[101] Specifically, the Commission should eliminate the "functional test" used under the existing rules to determine whether a provider must obtain authority prior to discontinuing a service pursuant to Section 214.[102] The functional test "obligates the Commission to look beyond the terms of a carrier's tariff and instead consider the totality of the circumstances from the perspective of the relevant community when analyzing whether a service is discontinued, reduced, or impaired under Section 214."[103] As several commenters note, this standard is vague and overly broad, creating confusion about when Section 214 approval is needed.[104] Rather than using a "functional" test to determine the service at issue, the Commission should rely on the description of the service provided in tariffs or customer service agreements.[105] As the Commission recognized, such an approach will utilize objective criteria to clearly delineate when a service discontinuance occurs.[106]

Similarly, the Commission should adopt its proposal to examine the entire range of offerings available to a community, or part of a community, in determining whether a service has

---

101 *Wireline Notice*, 32 FCC Rcd at 3288, ¶ 72.

102 AT&T Comments at 60-69; CenturyLink Comments at 45-47; Comcast Comments at 30-31; USTelecom Comments at 41-43; Verizon Comments at 39-41.

103 *Wireline Notice*, 32 FCC Rcd at 3302, ¶ 115.

104 AT&T Comments at 67-69; Comcast Comments at 31; USTelecom Comments at 41; Verizon Comments at 40-41.

105 AT&T Comments at 61-64; Comcast Comments at 31; USTelecom Comments at 41-42; Verizon Comments at 39.

106 *Wireline Notice*, 32 FCC Rcd at 3302, ¶ 116.

been discontinued.[107] Under this approach, a provider would not need to seek Section 214 discontinuance approval for a service if it offers the same features and functions through other services or products to consumers in the area.[108]

The Commission must also ensure that any reforms to the discontinuance process do not harm other providers and the customers of such providers. Specifically, some commenters argue that providers should not be required to seek Section 214 discontinuance approval for services that are used by wholesale carrier customers.[109] To the extent any discontinuance would affect network or service arrangements between an incumbent LEC and its wholesale customers, the Commission must ensure that those wholesale customers are provided with notice sufficient to make alternative arrangements. Such notice is important to ensure that customers of providers that rely on wholesale services continue to receive service without interruption.

Finally, as Charter and Comcast state, providers should not be subject to reporting requirements when another provider seeks approval to discontinue a service under Section 214.[110] To the extent a discontinuing provider is required to demonstrate the existence of competing services in an area, such a showing should be based on publicly available data,[111] or on an internal Commission review of Form 477 data submitted by providers in the area.[112] The Commission should not subject non-discontinuing providers to costly and burdensome information requests to support another provider's request to cease serving the area.

---

[107] *Id.* at 3305, ¶ 123.

[108] Comcast Comments at 32.

[109] AT&T Comments at 53-60; CenturyLink Comments at 47-48; USTelecom Comments at 36-37.

[110] Charter Comments at 58-60; Comcast Comments at 32-33.

[111] Charter Comments at 59; Comcast Comments at 33.

[112] Charter Comments at 59-60.

CONCLUSION

For all the reasons explained in these reply comments, NCTA encourages the Commission to take steps to ensure that all providers have the opportunity to attach facilities on utility poles and place facilities in the public rights-of-way in a reasonable time frame and subject to reasonable fees and obligations.

Respectfully submitted,

Steven F. Morris
Jennifer K. McKee
Danielle J. Piñeres
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW – Suite 100
Washington, D.C. 20001-1431

July 17, 2017